No. 78-308

In the Supreme Court of the United States

OCTOBER TERM, 1978

MOBAY CHEMICAL CORPORATION, APPELLANT

v.

DOUGLAS COSTLE, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

MOTION TO AFFIRM

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The Solicitor General, on behalf of the Administrator of the Environmental Protection Agency, moves that the judgment of the district court be affirmed.

OPINION BELOW

The opinion and order of the district court (J.S. App. 1a-22a) are not yet reported.

JURISDICTION

The judgment of the district court was entered on March 28, 1978 (J.S. App. 23a). The notice of appeal was filed on May 26, 1978 (J.S. App. 24a). On July 10, 1978, Mr. Justice Blackmun extended the time for docketing the appeal to August 24, 1978 (J.S. App. 25a). The jurisdictional statement was filed on August 23, 1978. The

jurisdiction of this Court is invoked under 28 U.S.C. 1253 and 2282, as they were in effect when this action was commenced in the district court.[1] Jurisdictional questions are discussed in notes 7 and 14, *infra*.

QUESTION PRESENTED

Whether Section 3(c)(1)(D) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. 136a (c)(1)(D), works a governmental taking of property for a private purpose or without just compensation, in violation of the Fifth Amendment, by permitting the Environmental Protection Agency to use pre-1970 pesticide registration application data in evaluating subsequent applications by other manufacturers without compensation to the applicant who submitted the data.

STATEMENT

The Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136 *et seq.* (FIFRA), requires registration of pesticides sold or shipped in interstate commerce and prescribes standards and procedures for such registration. Among other things, Section 3 of the Act, 7 U.S.C. 136a, authorizes the Administrator of the Environmental Protection Agency (EPA) to require that an applicant for registration submit data supporting the safety and efficacy of the product sought to be registered. Because data submitted by one applicant are often relevant to another manufacturer's registration application for a similar product, Congress in 1972 added to FIFRA Section 3(c)(1)(D), 7 U.S.C. 136a(c)(1)(D), which imposed certain

[1]As appellant notes (J.S. 2 n.1), the amended complaint was filed on April 23, 1976, prior to the repeal of 28 U.S.C. 2282. The Act repealing Section 2282 specified that the repeal would not affect actions already commenced. Act of August 12, 1976, Pub. L. No. 94-381, 90 Stat. 1119.

restrictions on the Administrator's use of such data.[2] Specifically, any submitted data that are protected from public disclosure by Section 10 of FIFRA, 7 U.S.C. 136h ("trade secret" data), can be used by EPA in support of another firm's application only with the data submitter's consent. Data other than "trade secret" data can be used by EPA in support of another firm's application without the submitter's consent, but only if the second firm offers to pay reasonable compensation to the submitter.[3]

Section 3(c)(1)(D) as it was enacted in 1972, however, did not clearly indicate whether the restrictions on EPA's use of data applied to all data that had ever been submitted to EPA (or its predecessor, the Department of Agriculture),[4] or only to data first submitted to EPA after enactment of the 1972 FIFRA revision. To resolve that question, which had spawned litigation, Congress in 1975 amended Section 3(c)(1)(D) to provide that the restrictions of that Section apply to data submitted on or after January 1, 1970, but not to data submitted before that date. Pub. L. No. 94-140, 89 Stat. 755. Thus, neither the submitter's

[2]Prior to the 1972 revision, FIFRA authorized the Administrator to request from the applicant a full report of the research on the pesticide sought to be registered. 7 U.S.C. (1970) 135b(a). There were no statutory restrictions on the Administrator's consideration of one firm's data to support another firm's application, whether or not the firm submitting the data had consented.

The Department of Agriculture, which enforced FIFRA from its enactment in 1947 until 1970, "routinely" and "freely" considered data submitted under FIFRA by one firm in support of other firms' applications. *Amchem Products, Inc.* v. *GAF Corp.*, 391 F. Supp. 124, 128 n.7 (N.D. Ga. 1975), vacated, 529 F. 2d 1297 (5th Cir. 1976), reinstated on remand, 422 F. Supp. 390 (N.D. Ga. 1976), appeal docketed, No. 76-3801 (5th Cir. 1977); see J.S. App. 21a n.22.

[3]If the two firms cannot agree on what constitutes "reasonable compensation," the Administrator is authorized to fix such compensation, subject to judicial review. 7 U.S.C. 136a(c)(1)(D).

[4]See note 2, *supra*.

consent nor an offer by the second applicant to pay reasonable compensation is required under the Act for EPA's consideration of data submitted prior to 1970. (The pertinent provisions of Section 3(c)(1)(D), as amended, are set out at J.S. 3.)[5]

Appellant challenged the Act, insofar as it applied to pre-1970 data, by amending a complaint then pending in the United States District Court for the Western District of Missouri and requesting a three-judge court.[6] Appellant sought an injunction against EPA's further enforcement of Section 3(c)(1)(D) with respect to pre-1970 data on the ground that EPA's consideration of appellant's pre-1970 data in support of other applications, without compensation to appellant, would violate appellant's Fifth Amendment rights. The three-judge court denied the injunction, holding that there had been no "taking" of appellant's property and, therefore, no constitutional violation:

> [T]his Court finds that the interference of § 3(c)(1)(D) with that alleged "right" [of exclusive use of the data] does not rise to the level of a taking of property. This Court simply cannot reasonably conclude that the Administrator's mere consideration of data which is required by and which he already possesses pursuant to a lawful regulatory scheme in order to determine the registrability of a pesticide product—that is, to assure its efficacy and safety prior to its transportation in interstate commerce—without disclosing the contents of that data to any other person and without diminishing in any manner the originator's use of its own data violates the Fifth Amendment to the United States Constitution.

J.S. App. 19a, footnote omitted.[7]

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[5]The Federal Pesticide Act of 1978, Pub. L. No. 95-396, 92 Stat. 819, made certain changes in the pertinent provisions of FIFRA. See Section 2(a) of the Act (92 Stat. 820-822), amending Section 3(c)(1)(D) of FIFRA. On one hand, the amendment creates a period of exclusive use for data submitted in support of pesticides that are registered after the 1978 Act and that contain a new active ingredient, and thus bars EPA from considering such data in support of another application, without the submitter's consent, for ten years. On the other hand, the amendment terminates the period during which compensation must be paid for EPA's use of post-1969 data, providing that the use of such data will be compensable only for 15 years from the date of submission. See S. Conf. Rep. No. 95-1188, 95th Cong., 2d Sess. 30 (1978).

[6]In its original complaint, appellant raised several non-constitutional claims that EPA was violating various provisions of FIFRA. These claims were heard and decided by a single-judge district court, which granted relief on some claims but not on others.

Mobay Chemical Corp. v. *Costle*, 447 F. Supp. 811 (W.D. Mo. 1978). See J.S. App. 1a n.1. Both parties appealed from this decision, but on joint motion by the parties the Eighth Circuit dismissed the appeals with prejudice. *Mobay Chemical Corp.* v. *Costle*, Nos. 78-1356 and 78-1402 (8th Cir. July 6, 1978).

[7]Because it found that there was no "taking," the court did not decide whether there was a public purpose for the alleged taking or whether appellant had an adequate remedy at law under the Tucker Act, 28 U.S.C. 1491, for any taking (J.S. App. 6a, 8a n.10, 10, 17a-19a).

Although the question apparently was not raised below and has not been noted by appellant here, it might be suggested that the three-judge district court was improperly convened under the former 28 U.S.C. 2282 and that this Court therefore lacks jurisdiction under 28 ~~U.S.C.~~ U.S.C. 1253 to entertain this appeal. See *Norton* v. *Mathews*, 427 U.S. 524, 529 (1976). The argument would be (see also note 14, *infra*) that appellant's constitutional attack in its amended complaint was not directed against the 1975 amendment to FIFRA or against any other Act of Congress, but solely against administrative action by EPA. The challenged action of EPA in considering appellant's pre-1970 data in support of applications of other manufacturers without compensation to appellant existed before the 1975 amendment; it was, in fact, challenged in appellant's original complaint filed prior to that amendment, see note 6, *supra*. The action by EPA with respect to pre-1970 data is not directed or compelled by the 1975 amendment, which provides in terms only that EPA may *not* take such action with respect to data submitted on or after January 1, 1970 (see J.S. 3). Where a constitutional attack is directed solely against administrative

ARGUMENT

The decision of the district court is correct, and appellant presents no question warranting plenary review by this Court.

Appellant claims that its property in its data is taken because, according to appellant, Section 3(c)(1)(D) of FIFRA "makes research and test data * * * freely available for the benefit of other private companies" and thus "takes" the "exclusive use" of the property from its owner (J.S. 14). But as the district court correctly noted (J.S. App. 18a), "The data is not transferred by [EPA] to any third parties." The data are "available" only to EPA

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action and does not implicate an Act of Congress, the convening of a three-judge court is improper. *Jameson & Co.* v. *Morgenthau*, 307 U.S. 171 (1939); *Sardino* v. *Federal Reserve Bank of New York*, 361 F. 2d 106, 113-116 (2d Cir.), cert. denied, 385 U.S. 898 (1966); *Woodward* v. *Rogers*, 344 F. Supp. 974, 977-979 (D.D.C. 1972), aff'd, 486 F. 2d 1317 (D.C. Cir. 1973); *Grutka* v. *NLRB*, 409 F. Supp. 133 (N.D. Ind. 1976).

In our view, however, these authorities are inapplicable here and the three-judge court was properly convened. Although FIFRA, as amended in 1975, does not direct or compel the challenged EPA practice, it addresses that practice specifically and plainly permits and ratifies it so far as pre-1970 data are concerned. The House Committee Conference Report specifically stated that the cost-sharing provisions of the Act were not being made applicable to pre-1970 data because to do so "could create a windfall." H.R. Conf. Rep. No. 94-668, 94th Cong., 1st Sess. 2 (1975), quoted at J.S. App. 15a n.14. This is a case where "the executive or administrative action complained of is so plainly directed or permitted by the statute that no fair construction could hold otherwise * * *, [so that] the constitutionality of the statute is necessarily drawn in question." *Sardino* v. *Federal Reserve Bank of New York, supra*, 361 F. 2d at 115. Accord, *Flast* v. *Cohen*, 392 U.S. 83, 88-91 & n.3 (1968); *Green* v. *Kennedy*, 309 F. Supp. 1127, 1131-1132 (D.D.C. 1970) (three-judge court), appeal dismissed, 400 U.S. 986 (1971).

(and, of course, to appellant). Whatever benefit may accrue to other parties from EPA's use of the data "does not rise to the level of a taking of [appellant's] property" (J.S. App. 19a).

As this Court recently stated in *Penn Central Transportation Co.* v. *New York City*, No. 77-444 (June 26, 1978), slip op. 24:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole * * *.

Although the district court did not have the benefit of *Penn Central*, it analyzed appellant's claim in the proper way: "Whether there has been a denial of due process must be determined by taking into account the purposes of regulation and its effect upon the rights asserted, and all of the circumstances which may render the regulation appropriate to the nature of the case" (J.S. App. 11a-12a).[8]

Appellant seeks to avoid this analysis by claiming that there is, for present purposes, a decisive difference between tangible property and intellectual property (J.S.

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[8]As in *Penn Central* (slip op. 28), one cannot conclude in this case that appellant "[has] in no sense been benefited by" the law it seeks to overturn. Under that law, EPA may consider, in support of registration applications filed by appellant, pre-1970 data submitted by other firms. The law thus secures to appellant, and to all other pesticide manufacturers who submit data to EPA, "an average reciprocity of advantage." *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922), quoted in *Penn Central, supra*, dissenting opinion of Mr. Justice Rehnquist, slip op. 9-10.

15). But the nature of the property notwithstanding, appellant does not dispute the district court's finding that the statutory scheme of FIFRA does not "diminish[] in any manner the originator's use of its own data" (J.S. App. 19a). Appellant did not surrender its pre-1970 data to EPA, much less to competitors; it simply provided EPA with a copy of it. Appellant contends, however, that "[t]he value of intellectual property lies in its *exclusive* use by its owner" (J.S. 15; emphasis in original). If this extravagant claim were true, the research and test data that appellant supplied to EPA before 1970 would have become worthless to appellant. But this is admittedly not so. Appellant stipulated that such data, after being submitted to EPA, "are used by [appellant] both in the development of additional formulations for registered products and in the development of new products which are chemically related to products previously developed" (J.S. 10-11); cf. *Penn Central Transportation Co.* v. *New York City*, *supra*, slip op. 30.[9]

[9]Appellant's claim about the exclusive use of intellectual property stands on its head what many have thought to be a critical distinction between intellectual and tangible property. See *International News Service* v. *Associated Press*, 248 U.S. 215, 250-251 (1918) (Brandeis, J., dissenting); *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U.S. 225, 230-231 (1964); *Kellogg Co.* v. *National Biscuit Co.*, 305 U.S. 111, 120-122 (1938). If appellant's claim is valid, it is not clear why an "owner" of data, information, ideas, or other intellectual property cannot successfully sue anyone who "uses" the property without permission. But there is no such cause of action, even when the property is copyrighted. *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390, 393-395 (1968). To be sure, trade secrets are protected by state law, as recognized in *Kewanee Oil Co.* v. *Bicron Corp.*, 416 U.S. 470 (1974), which appellant cites (J.S. 15). But even assuming that appellant would otherwise be entitled to trade secret protection (*but see* notes 12 & 13, *infra*), the Court in Kewanee expressly recognized (392 U.S. at 479-480, 493) that the protection of trade secrets may be modified by Congress. See also *Sears, Roebuck & Co.* v. *Stiffel Co.*, *supra*, 376 U.S. at 229, 231-233. When Congress so acts, it does not violate the Fifth Amendment.

It is true that the data were developed at substantial expense to appellant, and Congress recognized in the 1972 revision of Section 3(c)(1)(D) that compensation should be made for the benefits indirectly derived by others through EPA's consideration of the data. But in 1975 Congress made explicit its determination not to require compensation for data supplied in years long past.[10] Rather, Congress chose to strike a balance between "preventing the necessity of costly duplicative testing in order to produce governmentally-mandated data * * * [and] casting the entire burden upon the party first to meet the government requirements by producing and submitting that data" (J.S. App. 14a-15a). Congress chose January 1, 1970, as "a reasonable compromise between the competing interests of those seeking to register pesticide products * * * [in order] to end the problems delaying effective implementation of FIFRA" (J.S. App. 17a).[11]

[10]FIFRA was originally enacted in 1947. See note 2, *supra;* J.S. App. 2a.

[11]There is no merit to the contention of the *amici curiae* that the district court, in upholding this legislative judgment, subordinated Fifth Amendment analysis to consideration of congressional power under the Commerce Clause (Amici Br. 9-10). The district court recognized that "all great powers of Congress, including the commerce power upon which FIFRA is founded, are subject to the Fifth Amendment" (J.S. App. 11a).

Amici also attempt to introduce the question whether the Administrator is entitled to release to the public safety or efficacy data whose release would otherwise be prohibited by the trade secret provisions of Section 10(b) of FIFRA, 7 U.S.C. 136h(b) (Amici Br. 18). This question is irrelevant to the issue presented in this case, which is whether Section 3(c)(1)(D) of the Act works a taking of appellant's property. In any event, the question does not merit consideration by this Court, for Congress in the 1978 Act (see note 5, *supra*) endorsed the Administrator's interpretation of Section 10(b) and provided that safety and efficacy data should be available for public scrutiny notwithstanding the restrictions on release of other data. Federal Pesticide Act of 1978, Pub. L. No. 95-396, Section 15, 90 Stat. 819, 829-832.

Appellant's contention is, in effect, that Congress was compelled by the Fifth Amendment to set no cut-off date at all.[12] But as the district court held, "[t]he test of whether a particular enactment falls within the valid exercise of Congressional power so as not to run afoul of the Fifth Amendment is one of reasonableness" (J.S. App. 13a). The district court's analysis was in keeping with the body of Fifth Amendment law developed in this century. See *Penn Central Transportation Company* v. *New York City, supra,* slip op. 17-22. Not only is the scheme devised by Congress reasonable, but one "has difficulty ascertaining any real deprivation to [appellant]" (J.S. App.

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[12]If appellant is correct, one may question the constitutionality of various Acts of Congress that deprive persons of the "exclusive use" of intellectual property in return for a statutory advantage. Thus, the patent laws requre public disclosure of the invention—not simply disclosure to a government agency, as here. See *Kewanee Oil Co.* v. *Bicron Corp., supra,* 416 U.S. at 480-481. The copyright laws place copyrighted works in the public domain after the specified term and subject them to "fair use" even during that term. Appellant's position would also appear to be fatal to the compromise embodied in the Federal Pesticide Act of 1978, see note 5, *supra,* since that Act limits to 15 years the period during which compensation must be paid for EPA's use of data submitted after January 1, 1970.

17a).[13] The district court correctly concluded that the Act does not violate the Fifth Amendment.[14]

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[13]While appellant assserts that its pre-1970 data were "submitted confidentially" to EPA (J.S. 14), confidentiality is not at issue, since there is no claim that EPA has disclosed the data to others. Further, the district court found: "[U]nder the most credible view of the facts, * * * [appellant did not] have an expectation of compensation for its pre-1970 data. Under FIFRA prior to 1972, the Administrator of the EPA was not prohibited from considering one firm's data to support another firm's application, and did so routinely." J.S. App. 21a n.22. Appellant thus had no expectation, when it submitted its pre-1970 data to EPA in order to obtain statutory registration, that EPA would look at the data with blinders on.

Appellant's related policy arguments similarly lack substance. If data submitted before 1970 may be considered by EPA in support of other applications, but data submitted from 1970 on is protected, it is hard to see why "all those now developing and submitting intellectual property to EPA and to other agencies of the government will be discouraged," or why companies today "will hesitate to be the first to come forward with a new product * * *" (J.S. 18, 19). And if the "chilling effect" feared by appellant existed before 1972, when the protection appellant now claims the Fifth Amendment requires was not being provided (see J.S. App. 21a n.22), it is hard to understand why appellant was willing to make the research expenditures it did (see J.S. 10-11 & n. 10), or why "many pesticides are on the market today" (*id.* at 19).

[14]In the district court, EPA contended that even if there had been a taking of appellant's property, appellant was not entitled to injunctive relief because appellant was not entitled to exclusive use of its data and in any event there was an adequate remedy at law under the Tucker Act, 28 U.S.C. 1491 (J.S. App. 7a-8a & n.10). Because the district court found that there had been no taking, it did not reach these questions. If this Court notes probable jurisdiction, we shall support the judgment below on these grounds as well.

If appellant was not entitled to injunctive relief, it might be suggested that on this ground, as well as the ground discussed in note 7, *supra,* the three-judge court arguably was improperly convened

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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under the former 28 U.S.C. 2282. See *Norton* v. *Mathews*, 427 U.S. 524, 528-530 (1976); *Coffman* v. *Breeze Corps.*, 323 U.S. 316, 322-323 (1945). We think, however, that appellant's prayer for injunctive relief was non-frivolous enough (see J.S. App.7a-8a n 9, 10) to meet the threshold jurisdictional test, even though it would ultimately be rejected. See *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974); *Morales* v. *Turman*, 430 U.S. 322, 324 (1977).

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